

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 6, 2000

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REGULATORY AUTH.
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OFFICE OF THE
EXECUTIVE SECRETARY

**IN RE: Petition for Arbitration of the
Interconnection Agreement between BellSouth
Telecommunications, Inc. and Time Warner
Telecom of the Mid-South, L.P. Pursuant to
Section 252(b) of the Telecommunications Act of
1996**

Docket No. 99-00797

**Petition for Arbitration of ITC^DeltaCom
Communications, Inc. With BellSouth
Telecommunications, Inc., Pursuant to the
Telecommunications Act of 1996**

Docket No. 99-00430

**Petition of NEXTLINK Tennessee, LLC for
Arbitration of Interconnection Agreement with
BellSouth Telecommunications, Inc.**

Docket No. 98-00123

**RESPONSE OF ITC^DELTACOM COMMUNICATIONS, INC.
TO BELL SOUTH TELECOMMUNICATIONS, INC.'S
REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR CLARIFICATION**

I. INTRODUCTION

On April 25, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a Motion for Clarification in each of the three, above-captioned arbitrations, requesting that the Tennessee Regulatory Authority ("TRA") clarify the interim compensation mechanism for traffic to Internet Service Providers ("ISPs").

POSTED
7-7-00

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and Time Warner Telecom of the Mid-South, L.P. ("Time Warner") filed a brief in opposition to BellSouth's Motion for Clarification on May 15, 2000. Considering the extensive discussion of this issue during the hearing and in briefs, ITC^DeltaCom believed the issue had been fully presented to the TRA. BellSouth disagrees, as evidenced by its post-hearing (pre-order) barrage of pleadings. On June 13, 2000, BellSouth filed a Reply Memorandum in response to ITC^DeltaCom's and Time Warner's Response. ITC^DeltaCom will not restate the arguments made in its previous pleadings but rather will only address the new additional arguments raised by BellSouth in its Reply Memorandum, particularly those arguments that may be misleading.

II. DISCUSSION

A. ITC^DeltaCom Is Not An Affiliate of ITC Service Company, Inc.

Unlike BellSouth, which still retains monopoly power in many markets, ITC^DeltaCom cannot make true-up payments to BellSouth and recoup those expenses by raising rates to captive customers. BellSouth responds to this argument in an inaccurate and misleading way by asserting that Time Warner and ITC^DeltaCom "are affiliated or soon will be with two of the largest Internet Service Providers in the United States. Time Warner is being acquired by America Online, and an affiliate of DeltaCom -- ITC Service Company, Inc. -- is the largest shareholder of MindSpring, which is merging with EarthLink." *See BellSouth's Reply Memorandum*, at 5. According to BellSouth, "when Time Warner and DeltaCom talk about the difficulties of attempting to 'recoup' funds from customers on a retroactive basis, they are really talking about recouping money from themselves or, at the very least, from their affiliated companies." *Id.* This bald assertion with regard to ITC^DeltaCom is patently untrue.

ITC^DeltaCom Communications, Inc. is wholly owned by Interstate FiberNet, Inc. ("IFN"), and IFN is wholly owned by ITC^DeltaCom, Inc., a company publicly traded on the NASDAQ. Under Tennessee law, an "affiliate" is defined as "a person that directly, or indirectly through one (1) or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." T.C.A. § 48-11-201(1). ITC^DeltaCom is not an affiliate of Time Warner, America Online, MindSpring, EarthLink, or ITC Service Company, Inc. ITC^DeltaCom does not control nor is it controlled by any of these companies as contended by BellSouth.

BellSouth has known that ITC^DeltaCom is not affiliated with any ISP at least since April 25, 2000.¹ BellSouth's claim that ITC^DeltaCom is an affiliate of MindSpring or of ITC Services, Inc. is disingenuous.

In any case, BellSouth's argument is intended to distract the TRA. Intercarrier compensation is designed to compensate companies for carriage of each other's traffic.

¹ BellSouth knows that ITC^DeltaCom is not affiliated with any of these companies. In BellSouth's arbitration with ITC^DeltaCom before the South Carolina Public Service Commission, BellSouth issued interrogatories to ITC^DeltaCom, one of which addressed this very issue:

Interrogatory No. 19: Does DeltaCom own or have an interest in an ISP in South Carolina? Is DeltaCom affiliated in any way with an ISP in South Carolina (other than a customer relationship)? If so, explain in full the nature of such interest or affiliation and identify all documents that refer or relate to such interest or affiliation.

Response: No.

See ITC^DeltaCom Communications, Inc.'s Responses to BellSouth Telecommunications, Inc.'s First Interrogatories, at 9 (April 25, 2000), In re: Complaint of ITC^DeltaCom Communications, Inc. Against BellSouth Telecommunications, Inc. For Breach of Interconnection Terms and Request for Immediate Relief, Docket No. 1999-033-C (South Carolina Public Service Comm'n).

Compensation is due to ITC^DeltaCom for carriage of BellSouth's traffic regardless of the identity of the party to whom such traffic is delivered.

B. The Georgia Public Service Commission Has Not Ordered a Retroactive True-Up.

ITC^DeltaCom has asserted that a retroactive true-up provision would increase the carrier's risk, deter investors, and dampen the carrier's ability to raise capital. BellSouth contends that this argument "rings hollow" because after the Georgia Public Service Commission announced its decision in the ITC^DeltaCom arbitration, requiring the payment of reciprocal compensation for ISP traffic with a retroactive true-up, ITC^DeltaCom responded by issuing a press release, proclaiming the ruling as "favorable" and "pro-competitive." *See BellSouth's Reply Memorandum*, at 6. BellSouth's argument stretches the truth.

The Georgia Public Service Commission did not order a retroactive true-up in the ITC^DeltaCom arbitration. Indeed, no order has yet been issued. ITC^DeltaCom does not purport to know what the final order by the Georgia Public Service Commission will actually state with respect to reciprocal compensation. However, ITC^DeltaCom does know that the Georgia Public Service Commission voted to adopt the recommendation of its Staff regarding reciprocal compensation, which provided:

Consistent with the previous decisions of the Commission finding that calls to ISPs are local calls, the Staff recommends that the Commission require BellSouth to pay reciprocal compensation for calls to ISPs. Such payments shall include the tandem-switching rate. The rates, terms and conditions shall be pursuant to Docket 7061-U.

See Staff Recommendation Summary, In re: Petition for Arbitration of ITC^DeltaCom

Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the

Telecommunications Act of 1996, Docket No. 10854-U. Nowhere in this recommendation does

the Georgia Staff suggest a retroactive true-up. The Staff's recommendation, adopted by the Georgia Public Service Commission, is indeed "favorable" and "pro-competitive" as proclaimed by ITC^DeltaCom.²

In any event, although no party can know exactly what the Georgia Public Service Commission will actually state in its final order, it *is* clear what the TRA has decided. The TRA reached its own decision regarding reciprocal compensation and clearly intended *not* to require a retroactive true-up. If the TRA had intended otherwise, it would have stated so at its deliberations on April 4, 2000.

C. Objection to the "Effective Order" Language.

BellSouth requested the TRA to not only order a retroactive true-up but also to implement the FCC rule on the date it would become effective rather than on the date it would become final and non-appealable. ITC^DeltaCom objected to this request because during the 1999 negotiations between ITC^DeltaCom and BellSouth, BellSouth insisted that the interconnection agreement contain language to the effect that future legal and regulatory decisions cannot change the terms of the agreement until those decisions become "final and non-appealable." Only when it was of benefit to BellSouth did BellSouth come back to the TRA and request that the TRA carve out an exception to the "final and non-appealable" language, drafted by BellSouth itself, regarding issues of reciprocal compensation.

Recently, BellSouth offered to ITC^DeltaCom the option to change the "final and non-appealable" language so that all commission orders, not just those regarding reciprocal compensation, are effective immediately. ITC^DeltaCom has accepted BellSouth's offer.

² A copy of the Staff's recommendation is attached hereto as Exhibit A.

Therefore, ITC^DeltaCom withdraws its objection to BellSouth's Motion for Clarification on this very narrow point.

III. CONCLUSION

For the reasons stated herein and in the brief in opposition, BellSouth's Motion for Clarification should be denied.

Respectfully submitted this 6th day of July, 2000.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of July, 2000, a true and correct copy of the foregoing was served by hand delivery, facsimile transmission, overnight delivery or U. S. Mail, first class postage prepaid, to Guy Hicks, Esq., BellSouth Telecommunications, Inc., 333 Commerce Street, Suite 2101, Nashville, TN 37201-3300.


H. LaDon Baltimore

MEMORANDUM

**TO: ALL COMMISSIONERS
B.B. KNOWLES
LEON BOWLES**

FROM: GILBERT BENTLEY 

DATE: May 31, 2000

IN RE: D-10854-U; ITC DeltaCom/BST Arbitration

Attached is the Staff Recommendation on the remaining issues in the above referenced docket for your review.

If you need additional information please let me know.

EXHIBIT A

DOCKET NO. 10854-U

STAFF RECOMMENDATION SUMMARY

Issue 1(a)

Should BellSouth be required to comply with the performance measures and guarantees for pre-ordering/ordering, resale, and unbundled network elements ("UNE's"), provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions and the bona fide request processes as set forth fully in Attachment 10 of Exhibit A of this Petition?

Staff recommends adoption on an interim basis the Service Quality Measures ("SQMs") filed by BellSouth and the Enforcement Mechanisms filed by DeltaCom. The parties are directed to meet and jointly report back to the Commission in 30 days on the following:

- a) In those instances where SQMs do not have a benchmark/analogue, parties shall prepare a final proposal.
- b) For the Enforcement Mechanisms, parties shall prepare a matrix which shows what SQMs are attached to each tier of enforcement. Additionally, precisely state what the penalties are and what and how each party is affected for each tier of enforcement.

These interim SQMs and Enforcement Mechanisms shall remain in place until the Commission determines permanent SQMs in Docket 7892-U.

Issue 2

Pursuant to the definition of parity agreed to by the parties, should BellSouth be required to provide the following and, if so, under what conditions and what rates (1) Operational Support Systems ("OSS") and (2) UNEs?

BellSouth must provide non-discriminatory access for CLEC orders. BellSouth is not required to process DeltaCom's complex service orders electronically when it enters its own complex service orders manually. DeltaCom should take issues for further mechanization of complex orders to the Change Control Process.

BellSouth is obligated to provide UNEs to DeltaCom under the rates, terms and conditions set forth in the Commission's order in Docket 7061-U and Docket 10692-U.

*Proposed
Order*

Issue 2(a)(iv)

Should BellSouth be required to provide an unbundled loop using IDLC technology which will allow ITC^DeltaCom to provide consumers the same quality of service as that offered by BellSouth to its customers?

Section 251(c)(3) of the Federal Act requires BellSouth to provide nondiscriminatory access to network elements. For BellSouth to deny a CLECs customer the same quality of service that it provides to its own customers that are located in the same area violates the prohibition on discrimination. Therefore, in those areas in which BellSouth is providing the IDLC technology to its own customers, BellSouth must provide IDLC technology to ITC^DeltaCom's customers as well.

Issue 2(b)(ii)

Until the Commission makes a decision regarding UNEs and UNE combinations, should BellSouth be required to continue providing those UNEs and combinations that it is currently providing to ITC^DeltaCom under the interconnection agreement previously approved by this Commission?

BellSouth is required to provide UNEs & UNE Combinations pursuant to the Commission's orders in Dockets 7061-U and 10692-U respectively. Parties shall continue to operate under the existing agreement until the new agreement is executed.

Issue 2(b)(iii)

Should BellSouth be required to provide to ITC^DeltaCom extended loops or the loop/port combination? If so, what should the rates be?

The EEL is a UNE combination consisting of a loop, transport and a cross-connect. Like the FCC, the Commission has declined to define the EEL itself as a UNE. Third Report and Order, ¶ 478, Docket 10692-U. However, consistent with the Commission order in Docket No. 10692-U, CLECs can obtain at UNE rates combinations of UNEs that BellSouth ordinarily combines in its network including loop/port combinations.

Issue 3

Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Information Service Providers (ISPs)? What should be the rate for reciprocal compensation per minute of use, and how should it be applied?

Consistent with the previous decisions of the Commission finding that calls to ISPs are local calls, the Staff recommends that the Commission require BellSouth to pay reciprocal compensation for calls to ISPs. Such payments shall include the tandem-switching rate. The rates, terms and conditions shall be pursuant to Docket 7061-U.

Issue 4(a)

Should BellSouth provide cageless collocation to ITC^DeltaCom 30 days after a complete application is filed?

The Commission finds that an interval of 60 calendar days is reasonable. A 60-calendar day interval is sensitive to the potential competitive harm to DeltaCom from an unnecessary delay in the provisioning of cageless collocation as well as being consistent with the decisions of other states commissions that have addressed this issue. The Commission also finds that it is reasonable to allow BellSouth additional time in extraordinary circumstances. Therefore, in extraordinary circumstances, BellSouth will be obligated to provision cageless collocation to DeltaCom in 90 calendar days.

Issue 5

Should the Parties continue operating under existing local interconnection arrangements?

ITC^DeltaCom adequately noticed these issues in Exhibit B of its June 11, 1999 Petition. The language in the existing agreement on cross connect fees, reconfiguration charges, network redesigns, and NXX Translations should be continued in the new agreement. The definitions of the terms "local traffic" and "trunking options" should remain the same as in the existing agreement. The language in the existing agreement on routing ITC^DeltaCom's traffic should continue in the new agreement.

Issue 6(a)

What charges, if any, should BellSouth be permitted to impose on ITC^DeltaCom for BellSouth's OSS?

The Staff recommends that BellSouth be permitted to impose charges for OSS on ITC^DeltaCom consistent with the Commission's Order in Docket No. 7061-U.

Issue 6(b)

What are the appropriate recurring and non-recurring rates and charges for BellSouth two-wire and four-wire ADSL/HDSL compatible loops, Two-wire SL2 loops, Two-wire SL1 loops, Two-wire SL2 loop Order Coordination for Specified Conversion Time?

The rates for UNEs shall be consistent with the Commission's order in Docket No. 7061-U. The rates for extended loops and other UNE combinations should be the same as those ordered by the Commission in Docket No. 10692-U.

Issue 6(c) Should BellSouth be permitted to charge ITC^DeltaCom a disconnection charge when BellSouth does not incur any costs associated with such disconnection?

The Staff recommends that consistent with the Commission's order in Docket No. 7061-U, BellSouth not be allowed to impose disconnect charges if a disconnect does not occur. In Docket No. 7061-U, the Commission found that most disconnections involve customers switching providers or that another customer is taking the place of the old customer, so allowing BellSouth to charge for disconnection which occurs at the time of the new connection for the new CLEC or new customer would result in a double recovery. The Commission also found that in many instances, de-activation of services at the end user's location does not require physical disruption of the facility.

Issue 6(d)

What should be the appropriate rate for cageless and shared collocation in light of the recent FCC Advanced Services Order?

The appropriate rate for cageless and shared collocation is the rate for physical collocation, as established by the Commission in Docket No. 7061-U, unless there is no requirement to construct an enclosure. If BellSouth is not required to construct an enclosure, then the cost of doing so should be removed from the charge.

Issue 7(b)(iv)

Which party should be required to pay for the Percent Local Usage (PLU) and the Percent Interstate Usage (PIU) audit, in the event such audit reveals that either party was found to have overstated the PLU or PIU by 20 percentage points or more?

A party that substantially overstates PLU/PIU (20% or more) should bear the responsibility for the costs of the audit that revealed the inaccuracy. The appropriate incentive is for parties to accurately state usage, not to discourage reasonable and necessary requests for audits.

Issue 8(b)

Should the losing party to an enforcement proceeding or proceeding for breach of interconnection agreement be required to pay the costs of such litigation?

The Staff recommends that the Commission not include a "loser pays" provision in the agreement. It is not always the case that the resolution of a complaint identifies a clear winner and loser.

Issue 8(e)

Should language covering tax liability be included in the interconnection agreement, and, if so, should that language simply state that each Party is responsible for its tax liability?

The Staff recommends that the Commission not include language in the agreement covering tax liability. BellSouth did not demonstrate the need for such language in the agreement.